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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JAMES EDWARD CANADA, SR., Defendant and Appellant.	A142597 (Sonoma County Super. Ct. No. SCR 640850)

The People charged James Edward Canada, Sr. with indecent exposure with a prior conviction for the same offense (a felony) and annoying or molesting a child (a misdemeanor). The information also alleged that Canada had two prior serious felony convictions (prior strikes) for assault with a deadly weapon and three prior prison term convictions. A jury found Canada guilty on both counts and found all the prior conviction allegations to be true. The trial court sentenced Canada to an aggregate term of nine years in state prison.

On appeal Canada contends that the trial court erred by (1) denying his motion to represent himself and (2) failing to instruct the jury to determine whether his prior strike convictions were for assault with a deadly weapon and not assault by means likely to cause great bodily injury (GBI). We find no merit in Canada's first assertion of error, and, although we agree that the court erred in its instruction to the jury, the error was harmless. Accordingly, we affirm.

BACKGROUND

I.

Factual Background

The facts supporting the charges faced by Canada are not relevant to the issues raised on appeal, so we summarize them only briefly from testimony given at trial.

On October 13, 2013, at about 11:00 a.m., Elizabeth Patrick and her friend, Elisa Sanchez, were in a Santa Rosa park with their children. They saw Canada, who appeared to be homeless, and they offered him some food. Canada spoke to them about Jesus, but then started cursing and swearing. He commented that Sanchez's son was cute. Canada then moved away from them and lay on the ground. About five minutes later, Patrick's 11-year-old daughter drew Patrick's attention back to Canada. Canada's pants were pulled down to his ankles, his legs were spread, and he was "masturbating full. You could just see everything. I mean, everything." As Canada masturbated, he was facing the children and smiling. Patrick's daughter was scared.

Patrick and Sanchez gathered their children and started to leave the park. Canada got up and began to follow them. Sanchez yelled to her son to call 911, and Canada began to walk in the opposite direction. Patrick, Sanchez and the children waited at a corner for the police to arrive and saw Canada coming toward them on the sidewalk. They started yelling, and Canada turned around and "took off." Canada was apprehended by the police early that afternoon.

II.

Procedural Background

On December 12, 2013, the People filed an information charging Canada with (1) indecent exposure with a prior conviction for the same offense on September 23, 2013 (Pen. Code, § 314, subd. (1))[1] and (2) annoying or molesting a child (§ 647.6, subd. (a)(1)). The information also alleged one prior strike and two prior prison terms.

[1] All further statutory citations are to the Penal Code.

On January 6, 2014, Canada moved to strike the allegation that he had a prior conviction of section 314, subdivision (1). Before that motion could be heard, the People filed a first amended information, charging Canada with the same two counts as the original information, but now alleging two prior strikes and three prior prison term convictions.[2] The two alleged prior strike convictions were both for violations of section 245, subd. (a)(1) (assault with a deadly weapon or by means likely to cause great bodily injury, hereafter § 245(a)(1)), one on February 3, 1984, and the other on June 22, 2007. The three prior prison term convictions included the latter prior strike conviction, plus convictions for a violation of section 594, subdivision (a) on August 15, 2005, and for a violation of section 273.5 on February 27, 1998. On January 29, 2014, Canada pleaded not guilty and denied all enhancement allegations.

On February 11, 2014, Canada made a *Marsden* motion, which was denied.[3] Canada then made a *Faretta* motion to represent himself.[4] The court advised Canada that he should retain counsel at least until his motion to strike the allegation that he had a previous conviction for violating section 314, subdivision (1) was heard. That motion, the court told Canada, was critical to Canada's defense because, if granted, it would change the current alleged violation of section 314, subdivision (1) from a felony to a misdemeanor. Canada agreed and indicated he would raise his *Faretta* motion again at a later time.

On March 10, 2014, defense counsel expressed doubt as to Canada's competence to stand trial. The court suspended criminal proceedings pursuant to section 1368 and appointed a doctor to examine Canada. On March 18, 2014, the court vacated the initial

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[2] A second amended information was later filed to add the case number of Canada's alleged prior conviction for violating section 314, subdivision (1).

[3] Under *People v. Marsden* (1970) 2 Cal.3d 118, a defendant who moves for replacement of his appointed counsel must be afforded the opportunity to explain why he has not been adequately represented by counsel.

[4] In *Faretta v. California* (1975) 422 U.S. 806 (*Faretta*), the Supreme Court held that the Sixth Amendment ensures the right of a defendant to self-representation. (*Id.* at p. 819.)

appointment due to the doctor's unavailability and appointed Dr. Sylvia Shirikian to examine Canada. Dr. Shirikian's report was filed on April 2, 2014. Although it was her opinion that Canada "does suffer from a severe mental disorder," she also opined that he was competent to stand trial. On April 2, 2014, the parties submitted the matter of Canada's competency on Dr. Shirikian's report. The court found Canada to be competent and reinstated criminal proceedings.

On April 23, 2014, the court heard and denied Canada's motion to strike the allegation of a previous conviction for violating section 314, subdivision (1). Canada's counsel then informed the court that Canada wished to renew his *Faretta* motion. Canada was provided the proper forms.

On April 25, 2014, Canada made and the court denied a second *Marsden* motion.

On April 29, Canada filed a form declaration for defendants who wish to represent themselves. On the same day, the court heard Canada's *Faretta* motion. The court questioned Canada concerning his understanding of the hazards of self-representation. Trial had been set for May 2, and Canada said he would want 60 days to prepare for trial if he represented himself. The court told Canada that without a motion in writing and good cause shown, it would not grant a continuance. At the conclusion of the hearing, the court denied Canada the right to represent himself, commenting: "[Defendant is] very argumentative. He's very belligerent. He doesn't understand any of the court processes. Very hard to focus on getting correct answers to any question. He certainly is not capable of representing himself, in any case. [¶] The 1368 reports as well, really indicate some real challenges for the defendant to actively, accurately represent himself. . . . [¶] . . . [¶] . . . [T]his defendant is not in a position in the interests of justice to capably represent himself."

A jury was sworn in and instructed on May 6, 2014. The case was submitted to the jury on May 8, 2014. On May 9, 2014, the jury found Canada guilty on both counts, finding true the allegation that Canada had a prior conviction for violating section 314, subdivision (1). Canada requested that the jury decide the matters of his prior strike and prior prison term convictions, so those matters were submitted to the jury after it returned

its verdicts on the two criminal counts. The jury found the allegations of the two prior strike convictions and the three prior prison term convictions to be true.

On July 22, 2014, the court sentenced Canada to an aggregate term of nine years in state prison.

Canada timely filed a notice of appeal on July 24, 2014.

DISCUSSION

I.

The Denial of Canada's Faretta *Motion*

Canada contends that reversal is required because he was denied his Sixth Amendment right to represent himself. We disagree.

A state may not constitutionally "force a lawyer upon" a defendant who voluntarily and intelligently elects to proceed in a criminal case without counsel. (*Faretta*, *supra*, 422 US. at p. 807.) However, "the right of self-representation is not absolute." (*Indiana v. Edwards* (2008) 554 U.S. 164, 171.) In *Edwards*, the Supreme Court considered the "gray area" between the "minimal constitutional requirement that measures a defendant's ability to stand trial and a somewhat higher standard that measures mental fitness for another legal purpose." (*Id.* at p. 172.) The question at issue was whether a state could deny the right of self-representation at trial to a defendant whose mental fitness was in the gray area. (*Id.* at pp. 173–174.) The court ruled that a state could do so: "[T]he Constitution permits States to insist upon representation by counsel for those competent enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves." (*Id.* at p. 178.) In *People v. Johnson* (2012) 53 Cal.4th 519, our Supreme Court concluded that "California courts may deny self-representation when *Edwards* permits." (*Id.* at p. 525.)

Here, the trial court found that even though Canada was competent to stand trial, he was not competent to represent himself. We review the court's denial of Canada's *Faretta* motion for substantial evidence that Canada was not competent to represent himself. (*People v. Johnson*, *supra*, 53 Cal.4th at p. 531 ["The trial court's determination

regarding a defendant's competence must be upheld if supported by substantial evidence"].)[5]

Dr. Shirikian's competency report stated: "It is my opinion that Mr. Canada does suffer from a severe mental disorder. Although he denies symptomology there is evidence of grandiose, paranoid and delusional thought content experienced over the course of several years. There is also behavioral evidence suggesting the presence of a Bipolar affective disorder, namely Bipolar II, characterized by a hypomanic presentation. Further diagnostic interviewing is required to rule out the presence of hallucinations. Mr. Canada is committed to the masking of his symptoms and does not have any insight into his mental illness. He actively denies the need for any mental health treatment including psychotropic medication despite his involvement and participation in the mental health program while incarcerated within CDCR [California Department of Corrections and Rehabilitation] and as a Mentally Disordered Offender."[6]

When Canada made his initial *Faretta* motion on February 11, 2014, the form declaration he submitted to the court had two "no" answers, indicating that he did not understand certain propositions.[7] The court explained to Canada that "unless you can freely and intelligently and voluntarily answer 'yes' to all of these questions, no Judge is

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[5] The parties, in addition to discussing Canada's competence to represent himself, also discuss whether the court could have properly denied the *Faretta* motion because it was untimely. We need not reach that question in light of our affirmance of the court's denial on another ground.

[6] Dr. Shirikian's report noted that Canada had been committed to Atascadero State Hospital in 2006 as a mentally disordered offender pursuant to section 2964.

[7] Question B of the form declaration asks: "Do you understand that certain harm could come to you if you act as your own lawyer? For example, do you know that: . . . ?" This question is followed by seven propositions, to which the defendant must answer "yes" or "no." Canada answered "no" to (1) "It is well known that it is almost always not wise to act as your own lawyer?" and (2) "You may do more harm than good for yourself?" As submitted on April 29, 2014, the answer to the seventh proposition ("No one will be appointed to assist you in your self representation?") was changed from "yes" to "no," but we cannot determine whether that change was made before or after Canada submitted the declaration on February 11, 2014.

going to allow you to represent yourself, because [you] can't. You have to understand what you're doing." When Canada renewed his *Faretta* motion on April 29, 2014, he resubmitted the same form declaration he had used previously, without change to his two "no" answers. This is evidence that Canada failed to understand what the court advised on February 11.

On April 29, 2014, the court asked Canada about his "no" answer to the question whether he understood that it is well known that it's almost always not wise to act as your own lawyer. The court told Canada: "You're claiming things that you didn't know about, and that's the whole problem." The court asked Canada if he understood that "it's almost always, even if you are a lawyer, harmful to represent yourself." Instead of answering directly, Canada attempted to explain his "no" answer in a way that does not seem coherent: "With the way that that question was put to me, I answered that question correctly. I had knowledge that—of that charge, but not in the way that they said to me. Also, um—" The court again placed the question to Canada: "So, the question is, sir, do you understand that it is not wise to act as your own lawyer?" Again, Canada did not answer the question directly, and went off on a tangent: "I'm—I am having problems—according to State Bar, I get the final say on how my case is being handled. [Defense counsel] disagrees with State Bar." The court tried to redirect Canada: "I'm not asking about any complaints about the State Bar. What I'm trying to convey to you in this question—" Canada cut the court off, saying "I disagree with that." The court tried to pose the question in other ways, but Canada said "I disagree" to each point the court tried to make, expressing his dissatisfaction with his counsel's representation rather than his understanding of the possible consequences of proceeding without counsel.

We conclude that Dr. Shirikian's opinion that Canada suffers from a severe mental disorder,[8] Canada's answers on the form declaration, his failure at the hearing to

[8] Canada argues that "nothing in [Dr. Shirikian's] report compels the conclusion that appellant's mental condition precluded self-representation." The question before us is not whether the report "compels" such a conclusion, but whether it, along with other evidence, constitutes substantial evidence for the conclusion.

demonstrate understanding of the harm that could come to him by proceeding without counsel and his inability to comprehend or respond to the questions the court asked him together constitute substantial evidence that he was not competent to represent himself.

II.

The Jury's Finding that the Prior Strike Allegations Were True

Canada exercised his right to have the jury determine whether the prior strike and prior prison conviction allegations in the complaint were true. The People introduced into evidence a certified copy of one conviction and certified documents from the CDCR concerning the other convictions. The People also introduced a "CLETS printout" of Canada's criminal history, certified by an employee of the Sonoma County District Attorney's Office. The court admitted the CLETS printout into evidence over objection by Canada's counsel. Canada presented no evidence and his counsel made no argument.

The court instructed the jury that the People were required to prove the prior conviction allegations beyond a reasonable doubt. The jury was to "decide whether the evidence proves that the defendant was convicted of the alleged crimes." Concerning the prior strike allegations, the court instructed the jury: "The People allege that the defendant has been convicted of a violation of 245(a)(1) of the Penal Code on the 3rd of February, 1984, in the County of Sonoma in case number SCR-12062, and separately, a violation of 245(a)(1) on the 22nd of June, 2007 in the County of Sonoma in case number SCR-509998. [¶] In deciding whether the People have proved the allegations, consider only the evidence presented in this proceeding. Do not consider your verdict or any evidence from the earlier part of the trial. You may not return a finding that any alleged conviction has or has not been proved unless all twelve of you agree on that finding."

The jury found the two prior strike allegations to be true. Thus, the jury must have found that Canada had indeed been convicted of violating section 245(a)(1) in 1984 and in 2007.

The issue that Canada raises on appeal arises from the fact that not all prior convictions for violating section 245(a)(1) constitute prior strikes. Before January 1, 2012, and thus at the times of Canada's alleged prior strike convictions, a

violation of section 245(a)(1) could be committed by assaulting another person in either of two ways: (1) "with a deadly weapon or instrument other than a firearm" or (2) "by any means of force likely to produce" great bodily injury.[9] (Former § 245(a)(1), Stats. 2004, ch 494, § 1.) " '[A]ssault with a deadly weapon' is a serious felony. (§ 1192.7, subd. (c)(31).) On the other hand, while serious felonies include all those 'in which the defendant *personally inflicts* great bodily injury on another person' (*id.*, subd. (c)(8), italics added), assault merely by *means likely to produce* GBI, without the additional element of personal infliction, is not included in the list of serious felonies. Hence, . . . a conviction under the deadly weapon prong of [former] section 245(a)(1) is a serious felony, but a conviction under the GBI prong is not." (*People v. Delgado* (2008) 43 Cal.4th 1059, 1065.)

Accordingly, to prove that Canada had a previous conviction for a serious felony, it was not enough for the People to prove that he had been convicted for a violation of section 245(a)(1). The People also had to prove that the conviction was for assault with a deadly weapon and not for assault by means likely to cause great bodily injury. The court's instructions to the jury did not specify that requirement, even though the verdict forms asked the jury to find "true" or "not true" the allegation that Canada "has suffered a conviction of a serious or violent felony conviction for the crime of ASSAULT WITH A DEADLY WEAPON, in violation of Section 245(a)(1) of the Penal Code." Thus, although the verdict form recites all the required findings, the jury was not instructed to make all of those findings. It was instructed to find the allegation true on the single finding of conviction for violating section 245(a)(1). We agree with Canada that the court erred by failing to instruct the jury that in order to find the prior strike allegations true, it must find not only that Canada had been convicted of violating section 245(a)(1),

[9] A violation of section 245(a)(1) is now accomplished simply by assault with a deadly weapon other than a firearm. (§ 245(a)(1).) A violation of section 245, subdivision (a)(4) is now accomplished by "any means of force likely to produce great bodily injury." (§ 245, subd. (a)(4).)

but also that the violation was for assault with a deadly weapon rather than for assault likely to cause great bodily injury.

In discussing this error, Canada relies on *Apprendi v. New Jersey* (2000) 530 U.S. 466, 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); *Descamps v. United States* (2013) __ U.S. __, 133 S.Ct. 2276, 2288 (Sixth Amendment concerns "counsel against allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea' "); and *People v. Wilson* (2013) 219 Cal.App.4th 500, 513 ("The Sixth Amendment right to trial by jury and the Fourteenth Amendment right to due process . . . limit a judge's role in sentencing"). Canada's discussion of these cases is unnecessary, because the trial court's error—omission of an element needed to establish that Canada's alleged prior convictions for violating section 245(a)(1) were serious felonies—is clear. It is what Canada does not discuss—prejudice resulting from the error—that is far more important, because there is no possibility that he was prejudiced by the error. (See *People v. Flood* (1998) 18 Cal.4th 470, 475 [instructional error removing an element of a crime from jury's consideration is subject to harmless error analysis].)

For Canada's 1984 conviction for violating section 245(a)(1), the People admitted into evidence certified court records. The information filed in that case charged Canada with violating "Section 245(a)(1) of the Penal Code in that he did wilfully and unlawfully commit an assault upon JOHN MICHAEL PRICE, with a deadly weapon, to wit, a KNIFE." The verdict returned by the jury in that case found Canada guilty of violating "Section 245(a)(1) of the Penal Code, a felony, to wit: Assault with a deadly weapon . . . ." For Canada's 2007 conviction for violating section 245(a)(1), the People admitted into evidence certified documents from the CDCR. Among the documents is the abstract of judgment, specifying that the conviction for violation of section 245(a)(1) was for "ASSAULT WITH A DEADLY WEAPON TO WIT A VEHICLE." No rational jury examining this evidence could have concluded that either conviction was for assault

by means likely to cause great bodily injury and not for assault with a deadly weapon. Because Canada was not prejudiced, the trial court's instructional error was harmless.

DISPOSITION

The judgment of the trial court is affirmed.

STEWART, J.

We concur.

RICHMAN, Acting P.J.

MILLER, J.

People v. Canada (A142597)